

No. 10996

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GEORGE KERR,

Appellant,

VS.

P. J. SQUIER, Warden, United States Peniten-  
tiary, McNeil Island, Washington,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division

**FILED**

APR 23 1945

PAUL P. O'BRIEN,  
CLERK



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Circuit Court of Appeals  
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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer and Return, Respondent's .....	8
Appeal:	
Bond on .....	35
Certificate of Clerk to Transcript of Record on .....	38
Notice of .....	25
Praecept for Transcript of Record on...	37
Assignment of Errors .....	29
Bond on Appeal .....	35
Certificate of Clerk to Transcript of Record on Appeal .....	38
Demurrer, Respondent's .....	8
Findings of Fact and Conclusions of Law....	17
Memorandum On Petition .....	13
Names and Addresses of Attorneys of Record	1
Notice of Appeal .....	25
Order Extending Time .....	28
Order of Dismissal .....	23
Order Over-Ruling Demurrer and Granting Leave to Amend .....	16

Order to Docket and File Original Exhibits with Circuit Court of Appeals .....	33
Order to Show Cause .....	7
Petition for Extension of Time .....	26
Petition for Order to Docket and File Original Exhibits with Circuit Court of Appeals....	31
Petition for Writ of Habeas Corpus .....	2
Praecipe for Transcript of Record on Appeal	37
Reply of Petitioner to Respondent's Answer and Return .....	14
Stipulation and Request That Exhibits Be Considered in Their Original Form.....	41

## ATTORNEYS OF RECORD

JOHN M. SCHERMER, Esq.

JAMES W. MIFFLIN, Esq.,

1715 Smith Tower, Seattle, Washington

Attorneys for Petitioner-Appellant.

J. CHARLES DENNIS, Esq., United States Attorney

GUY A. B. DOVELL, Esq., Assistant United States Attorney

324 Federal Building, Tacoma, Washington

Attorneys for Respondent-Appellee.



United States District Court,  
Western District of Washington,  
Southern Division.

No. 657

GEORGE KERR,

Petitioner,

vs.

P. J. SQUIER, Warden, United States Peniten-  
tiary, McNeil Island, Washington,

Respondent.

PETITION FOR WRIT OF HABEAS  
CORPUS

To the Honorable Judge of the District Court of  
the United States, Western District of Wash-  
ington, Southern Division:

The petition of John M. Schermer and James W.  
Mifflin respectfully shows as follows:

1.

That you petitioners are attorneys at law, mem-  
bers of the Bar Association of the State of Wash-  
ington and duly and properly admitted to practice  
in the Courts of the State of Washington and the  
above entitled Court; that your petitioners have  
been retained to represent the petitioner, George  
Kerr, who at the present time is confined as an in-  
mate at the United States Penitentiary at McNeil  
Island, Washington.



## II.

That your petitioner, George Kerr, was on the 12th day of March, 1934 sentenced to confinement in the United States Penitentiary at McNeil Island, Washington, by judgment, to serve an aggregate term of 27 years and pay a fine of \$1000.00; that said judgment and sentence was in Cause Number 5925 In The Northern Division Of The United States District Court For The Northern District Of California, in a cause entitled United States Of America vs George Kerr; that said judgment was on a plea of guilty to counts 2, 4, 5, 6 and 7 [1\*] of an indictment containing seven counts filed in said cause; that upon motion of the Government Counts 1 and 3 of said Indictment were dismissed as to said Petitioner, George Kerr; that said sentence provides that said petitioner be imprisoned for a period of ten years on the 2nd Count, which charged the said defendant with the crime of robbing one Walter E. Williams, a person having lawful charge, control and custody of certain mail matter of the United States; said mail matter being described as three registered mail bags thereof; that said judgment and sentence provided that said George Kerr be imprisoned for a period of five years upon Counts 4, 5 and 6 each; each of said counts charging, in identical language, that the defendant did unlawfully, knowingly and feloniously steal, take and abstract from a Post Office in the United States of America a certain mail bag. That each of the mail bags described in Counts 4, 5 and 6

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\*Page numbering appearing at foot of page of original certified Transcript of Record

were the identical mail bags described in Count 2; that said George Kerr was further sentenced under Count 7 of said Indictment to be imprisoned for a period of two years and pay a fine of \$1000.00; said 7th Count charging said George Kerr, with others, with the crime of conspiracy to commit the robbery aforementioned in Count 2 and the various larcenies alleged in Counts 4, 5 and 6.

### III.

That said sentence was imposed on the 12th day of March, 1934, and the said George Kerr was forthwith committed to the County Jail for transportation to the Federal Penitentiary; that his sentence commenced to run from the 12th day of March, 1934 and he has served said sentence continuously up to the present time. [2]

### IV.

That by said judgment and sentence the service thereof on each count was to be consecutive.

### V.

That the Court pronouncing said sentence was without jurisdiction to sentence the said George Kerr on Counts 5 and 6 of said Indictment; that a computation of the time served by the said George Kerr, being given credit for good time, shows that he is now being illegally confined by the defendant herein; that the said George Kerr's record while an inmate of the institution, has been good and he is entitled to credit for good time served and industrial good time; that said computation shows that said

George Kerr completed service of the legal maximum time of imprisonment imposed under Counts 2, 4 and 7.

## VI.

That in addition thereto he has served a period in excess of 30 days by reason of the fine imposed by the Court in the sentence on Count 7 of the indictment.

## VII.

That the said George Kerr is a pauper, or poor prisoner, and totally without funds and unable to pay the fine of \$1000.00 as prescribed by said sentence; that he has not any property exceeding \$20.00 in value, except such as is by law exempt from being taken on execution for a debt; that until such time as the above entitled Court determines that he has served the maximum legal imprisonment he is not entitled to apply to the United States Commissioner in the [3] District where he is imprisoned for leave to take the pauper's oath and have the said Commissioner determine that he is in fact a pauper as within the meaning of Title 18, U. S. Code, Section 641.

Wherefore the petitioners pray that a Writ of Habeas Corpus may be granted directed to the said P. J. Squier, Warden as aforesaid, commanding him to have the body of George Kerr before the said Court at a time and place therein specified to do and receive what shall then and there be considered concerning said George Kerr, together with the time and cause of his restraint and said Writ,



and that he, George Kerr, may be restored to his liberty.

JOHN M. SCHERMER

and

JAMES W. MIFFLIN

Petitioners

JOHN M. SCHERMER

and

JAMES W. MIFFLIN

Attorneys for George Kerr

[4]

United States of America

State of Washington

County of King—ss.

John M. Schermer being first duly sworn upon oath deposes and says:

That he is one of the petitioners in the above entitled matter; that he has read the foregoing Petition for Writ of Habeas Corpus, knows the contents thereof and believes the same to be true.

JOHN M. SCHERMER

Subscribed and sworn to before me this 31 day of August, 1944,

[Seal]

WINIFRED KASTRUP

Notary Public in and for the State of Washington,  
Residing at Seattle

[Endorsed]: Filed Sept. 1, 1944. [5]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

This matter having come on for hearing this 1st day of September, 1944, and the petition of George Kerr for Writ of Habeas Corpus being on file and before the Court, and the Court having examined the files and records herein and being fully advised in the premises, now, therefore, it is hereby

Ordered, Adjudged and Decreed that respondent, P. J. Squier, Warden of the United States Penitentiary, McNeil Island, Washington, show cause in the above entitled Court at Tacoma, Washington, on Monday the 11 day of September 1944, at 10 o'clock A. M., of said day, why the prayer of the petitioner should not be granted, and it is further

Ordered that the Clerk of the Court forthwith mail or deliver to George Kerr, in whose behalf the petition was filed, to P. J. Squier, Warden of the Federal Penitentiary, McNeil Island, to counsel, the United States attorney for this District, or his assistant, each an uncertified copy of this order.

Done in open Court this 1st day of September, 1944.

CHARLES H. LEAVY

U. S. District Judge

Copy of above order and of petition handed U. S. Atty., Tacoma, 9/1/44 and mailed to George Kerr and P. J. Squier, Warden, 9/2/44. E. Seofield, Deputy.

[Endorsed]: Filed Sept. 1, 1944. [6]

[Title of District Court and Cause.]

### RESPONDENT'S DEMURRER

Comes now the respondent, by the undersigned, his attorneys, and demurs to the petition for writ of habeas corpus herein, upon the following grounds and reasons:

1. That said petition does not state facts sufficient to entitle the petitioner to a release from his confinement in the United States Penitentiary on McNeil Island, Washington;

2. And upon the further ground that said petition does not allege sufficient facts to show that said petitioner is being unlawfully restrained by respondent.

3. That copy or record of the instrument attacked was not attached to petition.

J. CHARLES DENNIS

United States Attorney

GUY A. B. DOVELL

Assistant United States  
Attorney

[Endorsed]: Filed Sept. 6, 1944.

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[Title of District Court and Cause.]

### RESPONDENT'S ANSWER AND RETURN

Comes now the above named respondent, P. J. Squier, Warden, United States Penitentiary, Mc-



Neil Island, Washington by J. Charles Dennis, United States Attorney for the Western District of Washington, and for his answer and return to the petition and amended petition for Writ of Habeas Corpus herein, and Order to Show Cause heretofore issued, admits, denies and alleges as follows:

I.

Respondent denies each and every allegation contained in the petition and amended petition for Writ of Habeas Corpus herein, save and except what is specifically admitted herein.

Further answering said petition and amended petition for writ of habeas corpus, and as an affirmative defense thereto and as return to the order to show cause issued herein, respondent alleges:

I.

That petitioner, George Kerr, is now being held in custody of the respondent as Warden of the United States Penitentiary at McNeil Island, Washington, by authority of a judgment *setence* and commitment entered by the District Court of the United States for the Northern District of California, Northern Division, on the 12th day of March, [8] 1934 in a certain criminal case in said court entitled "United States of America vs. George Kerr, and being designated as Case No. 5925-Cr., records of said court.

II.

That the indictment containing seven counts in said Cause No. 5925-Cr. was returned on September

30, 1933, to which defendant George Kerr on arraignment on January 2, 1934, entered his plea of not guilty, and thereafter on March 12, 1934, being represented by counsel the defendant, George Kerr, petitioner herein, was allowed to withdraw his plea of not guilty, on motion of his counsel, and the petitioner thereupon plead guilty to counts 2, 4, 5, 6 and 7, counts 1 and 3 of said indictment being dismissed on motion of the government, whereupon the said defendant, George Kerr, petitioner herein, was sentenced by the court to imprisonment on the second count for a period of ten years, on the fourth, fifth and sixth counts for a period of five years each, and on the seventh count for a period of two years and to pay a fine of \$1,000.00, sentence under fourth count to commence to run upon expiration of sentence under second count; sentence under fifth count to commence to run upon expiration of sentence under fourth count; sentence under six count to commence to run upon expiration of sentence under fifth count, and sentence under seventh count to commence to run upon expiration of sentence under sixth count.

That said indictment charged the defendant, George Kerr with violation of Section 320, Title 18, U.S.C.A. in Count two, in that defendant did rob one Walter E. Williams, a person having lawful charge, control and custody of certain mail matter being described as three registered [9] mail bags thereof, and in counts four, five and six in that defendant did commit larcenies from and out of a post office of the United States of certain mail bags which

were under separate labels and locks, and which charges were based upon violation of Section 317, Title 18, U.S.C.A. and in count seven in that defendant did conspire with others to commit the offenses charged in the preceding counts of the indictment.

### III.

That thereafter the petitioner was delivered under said commitment by the United States Marshal to the United States Penitentiary at McNeil Island, Washington, sentence having commenced to run March 12, 1934, the date of imposition; and that pursuant to said judgment, sentence, and commitment said petitioner is now imprisoned and confined in the United States Penitentiary on McNeil Island, Washington, and his custody and confinement under such judgment and sentence is lawful and valid.

### IV.

That the said petitioner, George Kerr, by virtue of his said confinement in the United States Penitentiary on McNeil Island has been deprived of no constitutional rights and is now lawfully and regularly confined in execution of said judgment and sentence.

Wherefore having fully answered the petition herein the respondent prays that the petition for writ of habeas corpus be denied and dismissed and the petitioner be remanded to the respondent's cus-



tody to carry out the sentence and judgment for which he is now imprisoned.

J. CHARLES DENNIS

United States Attorney

GUY A. B. DOVELL

Assistant United States

Attorney [10]

United States of America

Western District of Washington

Southern Division—ss.

P. J. Squier, being first duly sworn on oath, deposes and says:

That he is the respondent named in the above entitled action; that he has read the foregoing Respondent's Answer and Return and knows the contents thereof, and that the matter and things therein contained are true to the best of his knowledge, information and belief.

P. J. SQUIER

Subscribed and sworn to before me this 21st day of September, 1944.

(Seal) JOHN J. HOPKINS

Notary Public in and for State of Washington, residing at McNeil Island, Washington.

[Endorsed]: Filed Sept. 22, 1944. [11]

[Title of District Court and Cause.]

### MEMORANDUM ON PETITION

This petition is based upon the position that the District Court, Northern District of California, the sentencing Court, did not have jurisdiction to impose sentence on Counts 5 and 6 of the indictment.

*Ex parte Lago Marcino*, 13 Fed. Supp. 947;  
*Colson v. Johnston*, 35 Fed. Supp. 317.

A writ of habeas corpus will lie to determine the question of excessive punishment.

*Stevens v. McClaughry*, 207 Fed. 18.

Despite the fact that a one thousand dollar fine was imposed and petitioner has not been adjudged a poor prisoner or pauper, this Court has authority and must determine the question of excessive punishment prior to proceeding under Section 641 of Title 18, United States Code.

*Hogan v. Hill*, 9 F. Supp. 333.

*Kerr v. Johnston*, 130 Fed. 2d, 637 was an application for a release brought by this same petitioner in the United States District Court, Northern Division of California. That application was brought in 1941 and was decided in 1942. An examination of the original petition therein and the briefs shows that the sole contention at that time was that Counts 4, 5 and 6 were all invalid as being an integral part of Count 2, the robbery [12] count. At the time the petition in that case was brought, the petitioner, George Kerr, had not served the sentence imposed on Count 4. Therefore the question raised in the

instant petition for a writ of habeas corpus was not before the Court in *Kerr v. Johnston*, *supra*, and the language contained in that case is not controlling on the instant decision of the Court.

Respectfully presented,

JOHN M. SCHERMER

JAMES W. MIFFLIN

Attorneys for Petitioner

[Endorsed]: Filed Sept. 26, 1944. [13]

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[Title of District Court and Cause.]

PETITIONER'S REPLY TO RESPONDENT'S  
ANSWER AND RETURN

Comes now the above named petitioner, by his attorneys, John M. Schermer and James W. Mifflin, and for his traverse and reply to respondent's answer and return, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I and II of respondent's Affirmative Defense.

II.

Admits the allegations contained in paragraph III of said respondent's Affirmative Defense, except that petitioner denies the allegations contained in lines 17 and 18 thereof.

III.

Denies each and every allegation contained in paragraph IV of said Affirmative Defense.



Wherefore, having fully replied and traversed to the allegations contained in said respondent's Answer and Return and the affirmative defense therein, petitioner prays that the relief prayed for in his petition on file herein be granted.

JOHN M. SCHERMER

JAMES W. MIFFLIN

Attorneys for Petitioner [14]

State of Washington  
County of King—ss.

John M. Schermer, being first duly sworn upon oath deposes and says:

That he is one of the attorneys for the petitioner above named and makes this verification on his behalf for the reason that said petitioner is now confined to the United State Penitentiary at McNeil Island, Washington, and is not available for signature thereof; that he has read the foregoing Reply and Traverse and knows the contents thereof and that the matters and things therein contained are true to the best of his knowledge, information and belief.

JOHN M. SCHERMER

Subscribed and sworn to before me this 25th day of September, 1944.

(Seal) EDA M. KRULLER

Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed Sept. 26, 1944. [15]

[Title of District Court and Cause.]

ORDER OVER - RULING DEMURRER AND  
GRANTING LEAVE TO AMEND

This matter having come on for hearing the 11th day of September, 1944, the petitioner being present in person and represented by his counsel, John M. Schermer, and respondent being represented by his counsel, J. Charles Dennis, United States Attorney and Guy A. B. Dovell, Asst. United States Attorney, upon hearing of the demurrer interposed by the respondent, and the Court having examined the files and records herein and being fully advised in the premises,

It is Hereby Ordered, Adjudged and Decreed that the demurrer of the respondent interposed herein be and the same is hereby over-ruled,

And it is Further Ordered, Adjudged and Decreed that the petitioner is permitted to amend his said petitioned by filing with the Clerk of the above entitled court, certified copies of the indictment and judgment and sentence relevant to the above entitled cause, and serving a copy thereof upon counsel for the respondent. [16]

And it is Further Ordered, Adjudged and Decreed that respondent's exceptions to the foregoing order are noted and allowed.

Done in Open Court this 27 day of September, 1944.

CHARLES H. LEAVY  
Judge

Presented by:

JOHN M. SCHERMER

Attorney for Petitioner

Received copy of above order Sept. 27, 1944.

GUY A. B. DOVELL

Asst. U. S. Atty.

[Endorsed]: Filed Sept. 27, 1944. [17]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above entitled matter coming on before the court on the 16th day of October, 1944, for further hearing upon the Order to Show Cause heretofore issued herein, pursuant to continuance of hearing from September 27, 1944, and a previous continuance from September 11, 1944, the petitioner having appeared in person at time of said previous hearings and being represented now and at said prior hearings by John M. Schermer, of his counsel, John M. Schermer and James W. Mifflin, and the respondent having been represented by J. Charles Dennis, United States Attorney and Guy A. B. Dovell, Assistant United States Attorney for this district, and the court having heretofore on September 11, 1944, overruled the respondent's demurrer to the petition and respondent having thereupon made and filed his answer and return thereto, and the court having, on September 27, 1944, heard the testimony of the peti-



tioner and received the documentary evidence submitted by counsel for respondent and petitioner, and on the 16th day of October, 1944, received the further evidence submitted by counsel for petitioner, and the court having heard and considered the arguments of counsel, and considered the matter before the court, the law and the evidence, and being fully advised in the premises, now makes the following: [18]

## FINDINGS OF FACT

### I.

That petitioner, George Kerr, is now being hold in custody of the respondent as Warden of the United States Penitentiary at McNeil Island, Washington, by authority of a judgment, sentence and commitment entered by the District Court of the United States for the Northern District of California, Northern Division, on the 12th day of March, 1934, in a certain criminal case in said court entitled "United States of America vs. George Kerr," and being designated as Case No. 5925CR, records of said court.

### II.

That the indictment containing seven counts in said Cause No. 5925-CR was returned on September 30, 1933, to which defendant, George Kerr, on arraignment on January 2, 1934, entered his plea of not guilty, and thereafter on March 12, 1934, being represented by counsel, the defendant George Kerr, petitioner herein, was allowed to withdraw his plea of not guilty, on motion of his counsel, and petitioner

thereupon plead guilty to counts 2, 4, 5, 6 and 7, Counts 1 and 3 of said indictment being dismissed on motion of the government, whereupon the said defendant, George Kerr, petitioner herein, was sentenced by the court to imprisonment on the second count for a period of ten years, on the fourth, fifth and sixth counts for a period of five years each, and on the seventh count for a period of two years and to pay a fine of \$1,000.00, sentence under fourth count to commence to run upon expiration of sentence under second count; sentence under fifth count to commence to run upon expiration of sentence under fourth count; sentence under sixth count to commence to run upon expiration of sentence under fifth count, and sentence [19] under seventh count to commence to run upon expiration of sentence under sixth count.

That said indictment charged the defendant, George Kerr with violation of Section 320, Title 18, USCA in Count two, in that defendant did rob one Walter E. Williams, a person having lawful charge, control and custody of certain mail matter being described as three registered mail bags thereof, and in counts four, five, and six, in that defendant did commit larcenies from and out of a post office of the United States of certain mail bags which were under separate labels and locks, and which charges were based upon violation of Section 317, Title 18, U.S.C.A. and in count seven in that defendant did conspire with others to commit the offense charged in the preceding counts of the indictment.

## III.

That thereafter the petitioner was delivered under said commitment by the United States Marshal to the United States Penitentiary at McNeil Island, Washington, service from date of imposition; and that pursuant to said judgment, sentence and commitment said petitioner is now imprisoned and confined in the United States Penitentiary on McNeil Island, Washington, and his custody and confinement under such judgment and sentence is lawful and valid.

Petitioner, by counsel, excepts to so much of the foregoing finding as involves the validity of his present confinement, and his exception is allowed.

## IV.

That while an inmate of said institution said petitioner's conduct has been good and he has worked in prison industries and from a computation of the time served by said petitioner it appears he has already completed service of the legal maximum time of imprisonment [20] in custody imposed under counts 2, 4 and 7 of said indictment, and that on a cumulative sentence of seventeen years thereunder would have been entitled to conditional release on July 28, 1944, or, with fine, August 28, 1944.

## V.

That the three mail bags described in counts 4, 5 and 6 of the indictment were simultaneously taken and their taking involved but one transaction and were all of the mail bags carried at that time by the said Walter E. Williams, custodian thereof named



in said indictment and each was under a separate label and lock as set forth in the said counts, to-wit:

In count 4 as bearing label "From Sacramento, California, to San Francisco, California," and closed by rotary lock No. J 1988-425;

In count 5 as bearing label "From Sacramento, California, to Chicago, Illinois," and closed by rotary lock No. H18880-384; and

In count 6 as bearing label "From Sacramento, California, to Sacramento Terminal, Sacramento, California," and closed by rotary lock No. L 1057-11.

Done in Open Court this 23 day of Dec., 1944.

CHARLES H. LEAVY

United States District Judge.

From the foregoing Findings of Fact, the Court now makes the following

## CONCLUSIONS OF LAW

### I.

That the court has jurisdiction of the parties to this cause and of the subject matter thereof. [21]

### II.

That the court in said Cause No. 5925 CR had jurisdiction of the person and offense against him and had jurisdiction to impose the said aggregate sentence of twenty-seven years and a payment of a fine of \$1,000.00.

### III.

That each of the offenses set forth in counts 4, 5 and 6 of said indictment, which charged the peti-

tioner in each of said counts with the theft of a different mail bag, requires proof of a fact that the others do not, and the theft of each bag was a separate offense under the provisions of Section 317, Title 18, U.S.C.A. and the sentences imposed under said counts 4, 5 and 6 of the indictment are valid.

#### IV.

That petitioner's conviction and sentence under Sections 88, 317 and 320 of Title 18, U.S.C. upon his plea of guilty to the counts 2, 4, 5, 6, and 7 of the indictment in said Cause No. 5925 CR and representation by counsel as hereinbefore found, was and is in all respects valid and binding, and petitioner is not now unlawfully restrained and detained by the respondent.

#### V.

That petitioner has failed to establish grounds upon which he is now entitled to be released from him present confinement in the United States Penitentiary at McNeil Island, Washington, and that his petition for writ of habeas corpus and release from confinement should be denied.

To all of which Conclusions of Law petitioner, by counsel, excepts and his exceptions are hereby allowed.

Done in Open Court this 23 day of December, 1944.

CHARLES H. LEAVY

United States District Judge.

Presented by:

GUY A. B. DOVELL

Assistant United States  
Attorney

Approved as to form and Notice of Entry waived.

JOHN M. SCHERMER

Attorney for Petitioner.

[Endorsed]: Filed Dec. 26, 1944. [23]

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[Title of District Court and Cause.]

### ORDER OF DISMISSAL

The above entitled matter coming on before the court on the 16th day of October, 1944, for further hearing upon the Order to Show Cause heretofore issued herein, pursuant to continuance of hearing from September 27, 1944, and previous continuance from September 11, 1944, the petitioner having appeared in person at time of said previous hearing and being represented at all hearings in this matter before the court by John M. Schermer of his counsel, John M. Schermer and James W. Mifflin, and the respondent having been represented by J. Charles Dennis, United States Attorney, and Guy A. B. Dovell, Assistant United States Attorney for this district, and the court having heretofore on September 11, 1944, overruled the respondent's demurrer to the petition and respondent having thereupon made and filed his answer and return thereto, and the court having on September 27, 1944, heard the



testimony of the petitioner and received the documentary evidence submitted by counsel for respondent and petitioner, and on the 16th day of October, 1944, received the further evidence submitted by counsel for petitioner, and the court having heard and considered the arguments of counsel and having heretofore on the 23rd day of December, 1944, made and entered its Findings of Fact and Conclusions of Law wherefrom it appears that the petitioner is not entitled to any relief prayed for in his said petition; now, therefore, it is hereby

Ordered that the petition of the petitioner herein be, and the same is hereby denied; that the above entitled action be, and the same is hereby dismissed; and it is further

Ordered that the petitioner is remanded to the custody of the respondent, P. J. Squier, Warden of the United States Penitentiary on McNeil Island, Washington, to complete the service of the sentence imposed upon him by the District Court of the United States for the Northern District of California, Northern Division.

To which ruling the petitioner, by counsel, excepts and his exceptions are hereby allowed.

Done in Open Court this 23 day of Dec., 1944.

CHARLES H. LEAVY

United States District Judge.

Approved as to Form and Notice of Entry waived.

JOHN SCHERMER

Of Counsel for Petitioner

Presented by:

GUY A. B. DOVELL

Assistant United States  
Attorney

[Endorsed]: Filed Dec. 23, 1944. [25]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled Court to George W. Kerr, to P. J. Squier, Warden, United States Penitentiary, McNeil Island, Washington, to Charles A. Dennis, United States Attorney and Guy A. B. Dovell, Asst. United States Attorney: his attorneys:

You and each of you will please take notice that George W. Kerr, petitioner in the above entitled matter and appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from an order of dismissal and judgment made and entered in the above entitled cause on the 23rd day of December, 1944, denying said petition and discharging the Order to Show Cause theretofore issued herein.

Dated: December 28, 1944.

JOHN M. SCHERMER

JAMES W. MIFFLIN

Attorneys for George W. Kerr,  
Petitioner and Appellant

Copy of the within Notice of Appeal delivered to Guy A. B. Dovell, Asst. United States Attorney, this 29th day of December, 1944.

E. E. REDMAYNE,,  
Deputy Clerk

Receipt of a copy of the within Notice of Appeal is hereby acknowledged this 29th day of December, 1944.

GUY A. B. DOVELL,  
Asst. U. S. Attorney

[Endorsed]: Filed Dec. 29, 1944. [26]

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[Title of District Court and Cause.]

PETITION FOR EXTENSION OF TIME TO  
DOCKET CAUSE IN CIRCUIT COURT OF  
APPEALS

Comes now the petitioner above named and alleges as follows:

I.

That your petitioner above named now is and at all times herein mentioned was incarcerated as an inmate at United States Penitentiary at McNeil Island, Washington.

II.

That Findings of Fact and Conclusions of Law and an order denying petitioner's application for a writ of habeas corpus were entered in the above entitled cause on the 23rd day of December, 1944.



That thereafter, on the 28th day of December, 1944, notice of appeal from the entry of said Findings of Fact, Conclusions of Law and order was duly given and filed. That since that time petitioner's counsel have been engaged in the trial of several causes, each requiring extended preparation and extended attendance thereon. That this matter throughout has been handled by Mr. Schermer of petitioner's counsel, and that Mr. Schermer, on January 8, 1945, was without notice called to Palo Alto, California, by reason of the serious illness of his father. That as a result, Mr. Schermer has been unable to diligently prepare and perfect petitioner's appeal, and that petitioner's counsel require additional time to perfect the appeal. [27]

### III.

That petitioner believes that an extension of time to 28 day of February, 1945, will enable petitioner's counsel to properly perfect the appeal.

JOHN M. SCHERMER

JAMES W. MIFFLIN

Attorneys for Petitioner and  
Appellant

State of Washington  
County of King—ss.

John M. Schermer, being first duly sworn upon oath deposes and says: That he is one of the attorneys for appellant in the above entitled cause, that he has read the foregoing petition, knows the contents thereof and believes the facts therein stated

to be true and the application for extension of time to docket cause in the Circuit Court of Appeals is meritorious and well taken.

JOHN M. SCHERMER

Subscribed and sworn to before me this 5th day of February, 1945.

(Seal) WINIFRED KASTRUP

Notary Public in and for the State of Washington,  
residing at Seattle.

Copy received this 6th day of Feb., 1945.

J. CHARLES DENNIS,

U. S. Attorney

[Endorsed]: Filed Feb. 6, 1945. [28]

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United States District Court, Western District of  
Washington, Southern Division

No. 657

GEORGE KERR,

Petitioner,

vs.

P. J. SQUIER, Warden, United States Peniten-  
tiary, McNeil Island, Washington,

Respondent.

ORDER

This matter having come on for hearing this 6 day of February, 1945, upon petitioner and appellant's application for an extension or enlargement of time in which to docket the above entitled cause on appeal in the office of the Clerk of the Circuit

Court of Appeals for the 9th Circuit, petitioner appearing by one of his attorneys, John M. Schermer, and the court having examined the petition of the petitioner, and having examined the files and records herein and being fully advised in the premises, now, therefore,

It is Hereby Ordered, Adjudged and Decreed that the time for docketing the above entitled cause on appeal in the office of the Clerk of the United States Circuit Court of Appeals for the 9th Circuit be and the same is hereby extended and enlarged to the 28 day of February, 1945.

Done in Open Court this 6 day of February, 1945.

CHARLES H. LEAVY

Judge

Presented by:

JOHN M. SCHERMER

Of Attorneys for Petitioner

Approved:

HARRY SAGER

Asst. U. S. Atty.

[Endorsed]: Filed Feb. 6, 1945. [29]

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[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

Comes now George Kerr, petitioner in the above entitled action, and by John M. Schermer and James W. Mifflin, his attorneys of record, and in connection with his petition for appeal in the above entitled

action assigns the following errors which he alleges occurred upon the hearing of the above entitled action and upon which he will rely upon appeal to the United States Circuit Court of Appeals for the 9th Circuit, from the Order of Dismissal made by this honorable court on December 23, 1944:

I.

The court erred in ordering the petition denied and the Order to Show Cause to be discharged.

II.

The court erred in holding that the allegations contained in said petition for a Writ of Habeas Corpus were insufficient in law to justify the granting of an order, discharging the petitioner herein.

III.

The court erred in holding that the Conclusions of Law made by the court followed from the Findings of Fact made by the court. [30]

IV.

Petitioner alleges that from the Findings of Fact made by the court after the hearing of the evidence introduced and the examination of the exhibits introduced and admitted, that the court erred in making its Conclusions of Law.

Wherefore, said appellant and petitioner prays that the order and judgment of the United States District Court, Western District of Washington, Southern Division, made and entered herein in the



office of the Clerk of said court. on the 23rd day of December, 1944, denying the petition of George Kerr for a Writ of Habeas Corpus, heretofore entered herein, be reversed, and that the said George Kerr, petitioner and appellant herein, be granted a Writ of Habeas Corpus and discharged from the custody of the Warden of the United States Penitentiary at McNeil Island, Washington.

Dated this 9th day of February, 1945.

JOHN M. SCHERMER

JAMES W. MIFFLIN

Attorneys for Petitioner and  
Appellant

Received copy 2/10/45.

GUY A. B. DOVELL

Of Counsel for Respondent

[Endorsed]: Filed Feb. 10, 1945. [31]

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[Title of District Court and Cause.]

PETITION

To the Honorable Judge of the District Court of  
the United States, Western District of Wash-  
ington, Southern Division:

Comes now George Kerr, petitioner and appellant  
above named and respectfully represents to the  
Court:

I.

That he is the petitioner in the above entitled  
cause and that he is at present incarcerated as a

prisoner at United States Penitentiary at McNeil Island, Washington. That as a result of his incarceration his funds for prosecuting the appeal in the above entitled cause are limited.

## II.

That five exhibits were introduced during the trial of the above cause, and that said five exhibits consist as follows:

Petitioner's 1; Appellee's brief in the prior case of *Kerr vs. Johnston*.

Petitioner's 2; Certified copy of record, including indictment, commitment, etc., in the case of *United States vs. Kerr*.

Petitioner's 3; Brief of appellant *Kerr vs. Johnston*.

Petitioner's 4; Appellant's reply brief *Kerr vs. Johnston*. [32]

Petitioner's 5; Respondent's A-1; certified copies of petition for writ; order to show cause; return to order to show cause; points of authorities in support of petition; *Kerr vs. Johnston*.

That all the foregoing exhibits are somewhat voluminous, and would entail considerable expense to incorporate in the transcript of record.

That your petitioner respectfully requests that the court enter an order herein directing that the original exhibits be forwarded for docketing and filing in the office of the Clerk of the United States Circuit

Court of Appeals, 9th Circuit, at San Francisco,  
California.

JOHN M. SCHERMER

JAMES W. MIFFLIN

Attorneys for Petitioner

State of Washington

County of King—ss.

John M. Schermer, being first duly sworn upon oath deposes and says. That he is one of the attorneys for appellant in the above entitled cause, that he has read the foregoing petition, knows the contents thereof and believes the facts therein stated to be true.

JOHN SCHERMER

Subscribed and sworn to before me this 8th day of February, 1945.

(Seal) WINIFRED KASTRUP

Notary Public in and for the State of Washington,  
residing at Seattle.

Received copy 2/10/45.

GUY A. B. DOVELL

Of Counsel for Respondent

[Endorsed]: Filed Feb. 10, 1945. [33]

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[Title of District Court and Cause.]

ORDER

This matter having come on for hearing this 10 day of February, 1945, upon the petition of the

above named appellant for the issuance of an order directing that the original exhibits introduced and admitted herein during the trial of the above cause be forwarded to the office of the Clerk of the United States Court of Appeals, 9th Circuit, at San Francisco, California, for docketing, filing and use in the appeal herein in lieu of incorporation of said exhibits by copying by the Clerk of the above entitled Court in the transcript of record, and the Court having examined the files and records herein, and it appearing to the Court that said exhibits are somewhat voluminous, and that the appellant is incarcerated as a prisoner at United States Penitentiary at McNeil Island, Washington, and has limited funds with which to prosecute his said appeal, and the Court being fully advised in the premises, now, therefore,

It is Hereby Ordered, Adjudged and Decreed that the Clerk of the above entitled Court be and the same is hereby authorized to forward the following exhibits offered and admitted in the trial of the above cause: [34]

Petitioner's 1; brief.

Petitioner's 2; certified copy of record

Petitioner's 3; brief of appellant

Petitioner's 4; appellant's reply brief

Petitioner's 5; respondent's A-1. Certified copies of record

to the Clerk of the Court, United States Circuit Court of Appeals, 9th Circuit, at San Francisco, California, and the said Clerk of the above entitled



Court, in view of the foregoing order, is not required to copy said exhibits in the transcript of record.

Done in Open Court this 10 day of February, 1945.

CHARLES H. LEAVY

Judge

Presented by:

GUY A. B. DOVELL

JOHN M. SCHERMER,

Attorneys for Petitioner and  
Appellant

[Endorsed]: Filed Feb. 10, 1945. [35]

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[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents: That we, George Kerr, Petitioner, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana, as surety, are held and affirmatively bound under the above named respondent, P. J. Squier, Warden, United States Penitentiary, McNeil Island, Washington, in the full and just sum of \$250.00, to be paid to the said respondent, his heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Executed this 9th day of February, 1945.

The condition of this application is such that:

Whereas, on the 23rd day of December, 1944, in the above entitled action between the above named petitioner, George Kerr and the above named respondent, P. J. Squier, Warden, an order was entered denying petitioner's application for a writ of habeas corpus, dismissing the above entitled action and remanding the petitioner to the custody of the respondent, and the said petitioner has appealed to the [36] United States Circuit Court of Appeals, 9th Circuit.

Now, Therefore, the said George Kerr, petitioner, shall pay the costs if said appeal is dismissed, or the order of dismissal affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; otherwise in full force and effect.

GEORGE KERR

By JOHN M. SCHERMER,  
his attorney

(Seal) CONTINENTAL CASUALTY  
COMPANY

[Illegible]

Its Attorney in Fact

Approved 2/10/45.

CHARLES H. LEAVY  
U. S. Dist. Judge

[Endorsed]: Filed Feb. 10, 1945. [37]

[Title of District Court and Cause.]

## PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

You will please prepare a certified transcript of record on appeal to the United States Circuit Court of Appeals, 9th Circuit, in the above entitled cause, and include therein the following papers and proceeding:

1. Petition for writ of habeas corpus
2. Order to Show Cause
3. Respondent's demurrer
4. Respondent's answer and return
5. Petitioner's reply to respondent's answer and return
6. Respondent's memorandum on petition
7. Order over-ruling demurrer and granting leave to amend
8. Findings of Facts and Conclusions of Law
9. Order of dismissal
10. Notice of appeal
11. Petition for entry of order extending time for docketing in Circuit Court
12. Order extending time for docketing
13. Petition directing clerk to forward original exhibits to Circuit Court
14. Order directing clerk to send original exhibits to Circuit Court
15. Copy of this praecipe
16. Bond for costs

17. Assignment of Errors to be relied upon on appeal

Dated this 9 day of February, 1945.

JOHN M. SCHERMER

JAMES W. MIFFLIN

Attorneys for Petitioner and  
Appellant

Received copy 2/10/45.

GUY A. B. DOVELL

Of Counsel for Respondent.

[Endorsed]: Filed Feb. 10, 1945. [39]

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[Title of District Court and Cause.]

### CLERK'S CERTIFICATE

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 39, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause 657, George Kerr, Petitioner-Appellant, vs. P. J. Squier, Warden, United States Penitentiary, McNeil Island, Washington, Respondent-Appellee, as required by Appellant's Praecipe for the Transcript of the Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Order of Dismissal of the United States



District Court for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that pursuant to order of the District Court I have this day transmitted to the Circuit Court of Appeals for the Ninth Circuit, original exhibits numbered as follows, to-wit: Petitioner's Exhibits Nos. 1, 2, 3 and 4; Respondent's Exhibit No. A-1.

I do further certify that the following is a full true and correct statement of all expenses, fees and charges [40] earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, to-wit:

Appeal fee .....\$ 5.00

Clerk's fee for preparing, comparing and  
certifying Transcript of the Record on  
Appeal of the Petitioner-Appellant, 33  
folios @ 15c per folio, and 60 folios  
@ 5c per folio, and certificate..... 8.45

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\$13.45

I do further certify that the said fees, as above set forth, have been paid to me in full by the aforesaid Petitioner-Appellant.

I do further certify that the appeal in the foregoing cause was taken within the statutory time allowed, there being no particular provisions of the local rules of the District Court for this District

otherwise fixing the time for taking appeals from orders in habeas corpus cases.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 15th day of February, 1945.

[Seal]

MILLARD P. THOMAS

Clerk

By E. E. REDMAYNE

Deputy [41]

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[Endorsed]: No. 10996. United States Circuit Court of Appeals for the Ninth Circuit. George Kerr, Appellant, vs. P. J. Squier, Warden, United States Penitentiary, McNeil Island, Washington, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed March 5, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10996

GEORGE KERR,

Petitioner,

vs.

P. J. SQUIER, Warden, United States Penitentiary,  
McNeil Island, Washington,

Respondent.

STIPULATION AND REQUEST THAT EXHIBITS  
BE CONSIDERED IN THEIR  
ORIGINAL FORM

Comes now the parties above named and respectfully request the above entitled Court that said Court permit the appellant herein to present the original exhibits to the Court for consideration in their original form and not require said exhibits to be printed in the transcript of record.

I.

All the exhibits herein consist of printed briefs of a prior cause and certified copies of records and pleadings in said prior cause.

II.

That the appellant herein is incarcerated as an inmate at the Federal Penitentiary at McNeil Island, Washington, and does not have adequate funds, and that if said permission is granted it will

materially assist him in preparing and presenting his appeal herein. That the above set forth request is agreeable to counsel for all parties herein.

JOHN SCHERMER

JAMES W. MIFFLIN

Counsel for Apellant

OK:

J. CHARLES DENNIS

GUY A. B. DOVELL

Counsel for Respondent

Ordered that the original exhibits herein need not be printed, but will be considered by the Court in their original form.

CURTIS D. WILBUR

Senior United States Circuit  
Judge.

[Endorsed]: Filed Mar. 4, 1945. Paul P. O'Brien,  
Clerk.